

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 9581 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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WIRES & CABLES INDIA PVT. LTD. - Petitioner(s)
Versus
VOLTAMP TRANSFORMERS PVT.LTD. & 1 - Respondent(s)

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Appearance :

MR NILESH A PANDYA for Petitioner(s) : 1,
 MR ASHWIN L SHAH for Respondent(s) : 1,
 MR DIPEN C SHAH for Respondent(s) : 1,
 MS NALINI S LODHA for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

0Date : 12/12/2006

ORAL JUDGMENT

1. The petitioner – original defendant No.1, namely, Wires and Cables India Pvt. Ltd., has filed this petition under Article-227 of the Constitution of India, praying for quashing and setting aside the judgment and order passed by the learned Joint District Judge & Additional Sessions Judge, Fast Track Court No.11, Vadodara in Civil Misc. Appeal No.130 of 2003 dated 25.2.2005 reversing the judgment and order passed by the learned 2nd Joint Civil Judge (S.D.) Vadodara below an application Ex.5 in Regular Civil Suit No.305 of 2003.

2.It is the case of the petitioner that the

respondent No.1 herein i.e. Voltamp Transformers Pvt. Ltd., has filed Regular Civil Suit No.305 of 2003 before the learned Civil Judge (S.D.) Vadodara for declaration and permanent injunction against the petitioner and respondent No.2 i.e. Bank of Baroda. In the said suit, the main contentions of the respondent No.1 are that the petitioner had placed the letter of Intent (LOI) No.LOI/WCIPL/AVP (0) P.NGR/VAT/LOI5200 dated 25.4.2002 for the supply of two numbers 16/20 MVS, 16/11 KV, Power Transformers and as per the terms and conditions, 20% advance bank guarantee was given by the respondent No.1 to the petitioner and accordingly the respondent No.2 has also given bank guarantee agreement in favour of the petitioner. There was novation in the contract and the time of bank guarantee was already expired and the petitioner was required to return the bank guarantee as there was a breach of the

contract. The petitioner has played fraud and the petitioner was not ready and willing to perform his part of contract and on the contrary, the respondent No.1 was ready and willing to perform his part of the contract. In short, the respondent No.1 in the suit has contended that the petitioner was trying to encash bank guarantee after its validity period, and therefore, he has filed the said suit for declaration and permanent injunction praying that the petitioner has no right, authority and power to invoke/encash the Advance Bank Guarantee No.57/222 dated 15.7.2002 and 57/217 dated 10.7.2002. The respondent No.1 has further prayed that the petitioner be restrained from encashing/invoking the Advance Bank Guarantee No.57/222 dated 15.7.2002 and 57/217 dated 10.7.2002.

3. The respondent No.1 herein had also filed an application Ex.5 on similar contentions

and in paragraph-14 of the said application, the respondent No.1 has specifically contended that if injunction as prayed for was not granted, the respondent No.1 would suffer irreparable injury as their huge investment would be blocked and would suffer huge monetary loss. In the said application, the respondent No.1 has also contended that the petitioner was bound to obey the contractual terms, pay the consideration and lift the transformers and if the injunction as prayed for was not granted, the same would lead to multiplicity of litigation. Therefore, the respondent No.1 in the said application has prayed pending and final disposal of the suit the petitioner be restrained from encashing/invoking the Advance Bank Guarantee No.57/222 dated 15.7.2002 and 57/217 dated 10.7.2002.

4. Initially, the learned Civil Judge (S.D.) Vadodara has ordered to maintain status-quo

regarding guarantee and time was given to respondent No.2 to file written statement. The petitioner has filed detailed written statement before the trial Court and contended that there was gross suppression of material facts by the respondent No.1 and also played fraud with the Court, and therefore, contended for dismissal of the suit. The petitioner has further contended that as per the settled principles of law, the Court should not issue injunction restraining encashment of Bank Guarantee on the purported or alleged ground of breach of main contract between the buyer and the seller as contract of Bank Guarantee was an independent of the main contract and the Bank could not refuse encashment of Bank Guarantee. It was further contended that the vague plea of fraud, that too, being loosely pleaded and no iota of pleading containing material particulars of the alleged fraud as contemplated under Order-VI Rule-4 of the

Code of Civil Procedure was forthcoming from the plaintiff. It was further contended that the Civil Court has no jurisdiction to try the said suit because the purchase order issued by the petitioner clearly stipulated that it shall be the Court of Karnataka alone that shall have jurisdiction and no other Court has jurisdiction to decide the issue. Therefore, the said suit was not maintainable on the ground of jurisdiction also. It is further contended that, in fact, the petitioner has placed Letter of Intent to supply two numbers of power transformers by different letters and as per the Letter of Intent, 20% of the ex-works price for the transformers was required to be paid in advance by the petitioner to the respondent No.1 subject to the respondent No.1 furnishing advance bank guarantee for equivalent value. That finally formal amendments were incorporated for all the three Letter of Intent and accordingly the

respondent No.1 submitted two bank guarantees each for Rs.7,60,000/- and the respondent No.1 was advised to further carry the work as per the agreement. Respondent No.1 has also accepted the terms mentioned by the petitioner.

5.The petitioner has made payment of Rs.15.20 lacs as advance amount towards the supply of two numbers of 16/20 MVA, 16/11 KV Power Transformers in respect of which the advance Bank Guarantee was given by the respondent No.1. The Bank Guarantees have not been encashed. Therefore, the respondent No.1 was enjoying the benefit of the said amount of Rs.15.20 lacs, which amounts to unjust enrichment. That the respondent No.1 had already accepted all the conditions and though the respondent No.1 was enjoying the amount of Rs.15.20 lacs which was already paid by the petitioner, the respondent No.1 for the reasons best known to him, was

insisting for further payment. That the respondent No.1 has already agreed for novation of the contract and the respondent No.1 has not fulfilled his obligation in respect of the terms of the contract, and therefore, the petitioner has right to invoke the bank guarantee for the amount which was already paid by the petitioner to the respondent No.1 and accordingly the petitioner had asked the respondent No.2 to pay the amount of bank guarantee, but the respondent No.2 has given vague reply that the matter was referred to the higher authorities and it appears that the respondent No.1 has not made the payment of bank guarantee to the petitioner. The petitioner had also produced the list of documents in support of his case alongwith the said written statement.

6. That the respondent No.2 has also filed written statement and in short contended that

the Bank Guarantee document should be demanded/invoked in a specified manner and the petitioner has not demanded bank guarantee in proper form.

7.As per the case of the petitioner, the documents produced on record clearly suggested that the petitioner has specifically demanded encashment and/or invocation of the bank guarantee in favour of the petitioner, but the same was denied by the respondent No.2.

8.The trial Court heard the Ex.5 application at length and after considering the facts and circumstances of the case, came to the conclusion that the respondent No.1 has failed to prove his prima facie case and also failed to prove irreparable loss and/or fraud committed by the petitioner. The trial Court also found that balance of convenience was not in favour of the respondent No.1 and if

the interim relief would be vacated, then it would not cause any irreparable loss to respondent No.1 which could not be compensated in terms of money because the bank guarantee was in terms of money, and so far as term of money was concerned, there was no question of irreparable loss, and therefore, respondent No.1 has not succeeded to prove its prima facie case and was not entitled to any injunction. Under the said circumstances the trial Court has rejected the application Ex.5 filed by the respondent No.1 on 31.7.2003.

9. Being aggrieved and dissatisfied with the judgment and order passed by the learned 2nd Joint Civil Judge(S.D.), Vadodara, below an application Ex.5 in Regular Civil Suit No.305 of 2003, dated 31.7.2003, the respondent No.1 preferred Misc. Civil Appeal No.130 of 2003 before the District Court, Vadodara. In the said appeal, the petitioner filed counter

affidavit. At the time of hearing of the appeal, respondent No.1 filed an application under Order-41 Rule-27 of the Code of Civil Procedure for producing documents. As per the say of the petitioner, totally irrelevant documents were produced by the respondent No.1 which was not the subject of the suit. However, only with a view to delay the matter, the said documents were produced by the respondent No.1 and against that the petitioner has filed the counter affidavit. The petitioner opposed the said appeal and also filed written notes in reply. The appellate Court, after hearing the parties, has allowed the said appeal and quashed and set aside the order passed by the learned 2nd Joint Civil Judge (S.D.) Vadodara, below an application Ex.5 in Regular Civil Suit No.305 of 2003, dated 31.7.2003.

10. Being aggrieved by the said judgment and order passed by the learned Joint District

Judge & Additional Sessions Judge, Fast Track Court No.11, Vadodara, in Misc. Civil Appeal No.130 of 2003, the petitioner has filed the present petition under Article-227 of the Constitution of India before this Court.

11. The petition was admitted and rule was issued on 13.5.2005. The impugned order of the appellate Court was suspended. However, it was made clear that if the Bank Guarantee was encashed, the same would be subject to the result of the suit.

12. Heard Mr.Nilesh A. Pandya, learned advocate appearing for the petitioner and Mr.Ashwin L. Shah, learned advocate appearing for the respondent No.1 and Ms Nalini Lodha, learned advocate appearing for the respondent No.2.

13.Mr.Pandya, learned advocate appearing for the petitioner has submitted that the respondent No.1 has suppressed the material

facts and has not come with the clean hands before the trial Court and it was practically an abuse of process of law, and therefore, only on this ground the suit as well as injunction application were liable to be dismissed with cost in view of settled principle of law as laid down by the Hon'ble Supreme Court in the case of
S.P.Chengalvaraya Naidu (dead) by L.Rs., vs. Jagannath (dead) by L.Rs., reported in AIR 1994 Supreme Court 853. Mr. Pandya has further submitted that it is well settled principle of law that the Court should not issue injunction restraining encashment of Bank Guarantee on the alleged ground of breach of main contract between the buyer and the seller as the contract of Bank Guarantee is independent of the main contract. He has further submitted that the respondent No.2 – Bank has no right to refuse encashment of bank guarantee as the bank has no concern with regard to any dispute between the

petitioner and respondent No.1. He has further submitted that the bank guarantee agreement issued by the respondent No.2 in favour of the petitioner clearly gives the guarantee that as and when the petitioner asks for the invocation of the said guarantee, in that case, the bank shall release the amount as per the guarantee. He has further submitted that there was vague plea of fraud that too being loosely pleaded and there was no iota of pleading containing material particulars of the alleged fraud as contemplated under Order-VI Rule-4 of the Code of Civil Procedure. He has further submitted that there was no allegations with regard to fraud committed by the petitioner with the respondent No.2, and therefore, as per the settled principles of law laid down in the case of Federal Bank Ltd., vs. V.M.Jog Engineering Ltd., in 2001(1) SCC 663, unless fraud is legally and clearly established prima facie and also that there would be

irreparable damage, the Court cannot interfere in the course of encashment of bank guarantee or letters of credit. He has further submitted that no case of fraud was even remotely established much less prima facie case by the respondent No.1. In fact, respondent No.1 has already received the entire amount as advance sale consideration from the petitioner, and therefore, if the petitioner wanted to encash the bank guarantee, there would be no irreparable damage or loss to the respondent No.1.

14. Mr.Pandya has further submitted that the suit filed by the respondent No.1 before the trial Court for declaration and injunction was not maintainable in law, and therefore, the respondent No.1 was not entitled to any equitable relief. He has further submitted that there is settled principle of law that if the discretionary powers are exercised by the trial Court under Section-96 read with

Section-151 of the Code of Civil Procedure, the lower appellate Court should not interfere under the provisions of Order-43 Rule-1(r) of the Code of Civil Procedure. He has further submitted that the respondent No.1 has acted smartly with the Court by conveniently not mentioning the amount of two bank guarantees of Rs.7,60,000/- each only with a view not to pay the proper Court fee stamp and only simple declaration suit valued at Rs.300/- was filed. In view of this fact, respondent No.1 was not entitled to any relief.

15. Mr.Pandya has further submitted that even the purchase order issued in favour of the respondent No.1 clearly stipulates that if any dispute would arise between the parties, in that case, the Court of Karnataka would have the jurisdiction to try such dispute and no other Courts. Under these circumstances, only Civil Court of Karnataka will have

jurisdiction to try the said suit and Civil Court at Vadodara has no jurisdiction to try the said suit. He has further submitted that the petitioner had given three letters of intents on 25.4.2002 for two numbers of power transformers, which were accepted by the respondent No.1 and as per the said letter of intents, 20% of ex-works price of the transformer was payable in advance to the respondent No.1 subject to the respondent No.1 furnishing advance bank guarantee for equivalent value. Accordingly, petitioner has already paid Rs.15.20 lacs to the respondent No.1 and subsequently the respondent No.1 had issued two bank guarantees of Rs.7,60,000/- each. The letter dated 2.9.2002 clearly mentioned that the bank guarantee was to be extended to cover inspection of Core Assembly and the said minutes of meeting has been duly accepted and signed by the representative of the petitioner and both the parties knew that

there was a novation of the contract, necessitating a compliance on the part of the respondent No.1. The letter of intent was novated in favour of a company, namely, Marshal's Power & Telecom (I) Ltd. The respondent No.1 has commercially acceded to this novation and agreed to the same expressly. However, this fact was suppressed before the Civil Court and the said Marshal's Power & Telecom (I) Ltd., was proper and necessary party which was deliberately not joined by the respondent No.1 in the said suit and therefore, on the suppression of this fact, the suit deserves to be dismissed with cost. He has further submitted that respondent No.1 has already received the amount of Rs.15.20 lacs paid by the petitioner and there was no question of paying the balance amount as per the novation of the contract between the parties. He has further submitted that the advance bank guarantee being obviously irrevocable and

also unconditional, the petitioner has right to invoke and/or encash the said bank guarantee which was scheduled to expire on 30.11.2002.

16. Mr.Pandya further submitted that the petitioner has already written a letter to respondent No.2 on 18.11.2002 requesting the respondent No.2 bank to extend the bank guarantee for a further period of one month as the transaction was not completed by the respondent No.1. The respondent No.2 bank was directly or indirectly supporting the conduct of the respondent No.1 and not giving any response to the letter written by the petitioner on 18.11.2002, and therefore, the petitioner has written another letter on 21.11.2002 calling upon the respondent No.2 to extend the bank guarantee forthwith and not extending the bank guarantee, in that case, the said letter be considered as invocation of the bank guarantee. The

respondent No.2 has given vague reply that the matter was referred to higher authorities and in the meantime, the suit was filed which itself suggested that the respondent No.2 has joined hands with the respondent No.1. He has further submitted that the petitioner has specifically written a letter and sent his authorised person for encashment of bank guarantee on 17.3.2003 and also written another letter on 22.3.2003 categorically informing the respondent No.2 that the respondent No.1 had not fulfilled its obligation in respect of the guaranteed terms of the contract and the bank shall not in any manner delay the payment of the amount due to the petitioner in respect of the bank guarantee already invoked by the petitioner.

17. Considering all the aforesaid submissions and grounds raised by the petitioner, Mr.Pandya has emphatically submitted that the order of the appellate court is required to

be quashed and set aside and that of learned Civil Judge (S.D.) Vadodara is required to be restored.

18.Mr.Ashwin L. Shah, learned advocate appearing for the respondent No.1 has relied on the affidavit-in-reply filed on behalf of the respondent No.1. He has submitted that the question of the Company enjoying the benefit of the amount of Rs.15.20 lacs does not arise. The amount was given by way of advance payment of a part of the price of the transformers ordered by the petitioner and the same was to be appropriated towards the sale price and the petitioner was required to make the payment of the balance amount of the price and lift the transformers. The petitioner has not made the payment of the balance amount though huge amount of the respondent No.1 being 80% of the price of the said transformers was blocked in the said transformers causing severe financial

constrains to the respondent No.1 endangering its very existence. He has further submitted that there was a novatio of the contract in favour of Marshal's Power & Telecome (I) Ltd., and all the benefits and obligations and also other terms and conditions with respect to the original contract with the petitioner were transferred to Marshal. Accordingly, the benefit under the concerned bank guarantees was also so transferred in favour of Marshal. In view of this, the petitioner was no longer the beneficiary of the said bank guarantees and as such, was not entitled to enforce the encashment thereof. As such, the defence of the petitioner in this connection was totally misconceived and not tenable. The very basis of the said defence was non-existent. The beneficiary of the said bank guarantees was Marshal on account of the novatio and it was only Marshal who was entitled to enforce the encashment thereof, if at all. He has

further submitted that the bank guarantee in question has ceased to be effective and operative long time back and has thus ceased to exist.

19. Mr.Shah has further submitted that the concerned bank guarantees were valid only till the stage of core assembly inspection. The petitioner by its letter dated 19.10.2002 had waived its right to have the said core assembly inspection. As such, the validity of the said bank guarantees came to an end on the date of the said letter with the result that the said bank guarantees became non-existent from the said date. As far as the compliance with other conditions in connection with the said contract was concerned, it was necessary to so comply only if required by the petitioner. Since the petitioner has never required the respondent No.1 to comply with the said terms, any recourse to the same was not available to the

petitioner. He has further submitted that the petitioner was required to make a statement to the Bank to the effect that the vendor has not fulfilled their obligation in respect of the guarantee terms of the order and as such, he is invoking the encashment of the bank guarantees. This was a condition precedent to be satisfied before the bank was called upon to require the bank to make payment under the said guarantees. The petitioner has not made such statement and as such, he was not entitled to the encashment of the bank guarantees. Moreover, it was not the case of the petitioner that the Company has committed default in connection with the contract. As such the petitioner was also not entitled to said encashment. As a matter of fact, Rail India Technical and Economic Services Ltd.(RITES), Mumbai, Government of India Undertaking had issued the inspection certificates of the transformers manufactured by the Company and no adverse remark with

respect to them was found by it.

20. Mr.Shah has further submitted that a contract of guarantee is a tripartite contract between the principal debtor, the creditor and the surety. The respondent No.1 is the principal debtor, the petitioner is the creditor and the Bank is the surety. As such, the respondent No.1 being party to the said contract, was entitled to contend that the concerned bank guarantees were not enforceable in the circumstances. The say of the petitioner that the said contract was a contract between himself and the Bank only and the respondent No.1 was only an outsider and was not concerned with him, was totally misconceived and not tenable. The said contention was directly in conflict with the express provisions of law. He has further submitted that the appellate Court was fully justified to issue injunction restraining the encashment of the guarantees pending the

hearing of the suit. Mr.Shah further submitted that enforcement of the guarantee said to be made by the petitioner was a fraud upon the respondent No.1 as the petitioner has kept back all the above facts and tried to base his claim on totally incorrect consideration of law. Because of this, the claim of the petitioner was fraudulent and could not be allowed. He has further submitted that if the petitioner has a genuine case for the refund of the advance payment, he may have recourse to the proper legal remedies but cannot bring pressure upon the respondent No.1 and have a short cut to achieve his desire which he cannot do if he approaches a Court by way of a civil remedy. The petitioner himself was in default in not lifting the transformers manufactured by the respondent No.1 by investing a huge amount. He has further submitted that the offender himself tried to have the protection of law against the consequences resulting from his

own default. He has further submitted that the respondent No.1 is a small scale unit. Large amount has been invested by him in the manufacture of the transformers ordered by the petitioner. There was no complaint with respect to the said transformers from any quarter including the petitioner himself. The petitioner has refused to take delivery of the transformers by making payment of the balance amount only because the parties for which he had placed the order with the respondent No.1 had cancelled the orders placed by them with the petitioner. The petitioner should be required to produce the correspondence between him and such third parties. The consequent burden on account of the said cancellation was sought to be shifted by the petitioner on the respondent No.1 at the same time illegally recovering the advance payment made by him to the respondent No.1 by encashing the bank guarantees. This is clearly dishonest and

fraudulent and should not be encouraged. He has further submitted that if the petitioner was allowed to succeed then it was apparent that very purpose of requiring the advance payment towards the price of the transformers would be lost and it would amount to the mockery of the stipulation to the effect. Mr.Shah has, therefore, submitted that the petition deserves to be dismissed with costs.

21. Ms.Nalini Lodha, learned advocate appearing for the respondent No.2 – Bank has relied on the affidavit-in-reply filed on 10.8.2005. She has submitted that on perusal of the bank guarantee it is evidently clear that the said bank guarantees stipulate invocation in a specified manner whereas the petitioner has failed to abide by the terms of the contract, namely, bank guarantees in so far as the invocation of the same is concerned. Since the invocation of the bank guarantee was not in conformity with the manner laid down in

the contract, the respondent No.2 bank was justified in not making the payment and in the meantime, the said bank guarantees have expired. The respondent bank relied on the decision in the case of M/s. Harprashad & Company vs. Sudarshan Steel Mills & Ors., AIR 1980 Delhi 174 and in the case of M/s. Ansal Properties & Industries (P) Ltd., vs. Engineering Projects India (Ltd.), AIR 1998 Delhi 176, wherein it has been specifically held that the invocation has to be as per terms of the guarantee else the beneficiary is not entitled to the payment of the bank guarantee. She has denied all the charges levelled against the respondent No.2 bank to the effect that the bank has joined hands with the respondent No.1 and not made payment of the bank guarantee to the petitioner. She has further submitted that the respondent No.2 has already contended in its written statement filed before the trial Court that the petitioner has not made

invocation in the manner specified in the guarantee bond and hence the invocation cannot be honoured which is not in consonance with the stipulation in the bank guarantee. She has further submitted that the respondent No.2 bank has no concern with regard to the dispute between the petitioner and the respondent No.1, but the respondent No.2 – bank was very much within its rights to refuse the encashment as the invocation of the bank guarantee on the part of the petitioner was not as per the terms of bank guarantee. The respondent No.2 bank is bound to release the amount only upon invocation of the bank guarantees in the manner stipulated therein during its validity period. The same was not done by the petitioner and in the meantime, the bank guarantees have expired. She has, therefore, submitted that the bank guarantee expired on 30.11.2002 and the Civil Suit was filed on 25.3.2003. She has, therefore, submitted that the question of

directing the respondent No.2 to release the bank guarantees of Rs.7,60,000/- each by way of main relief as well as the interim relief does not arise at all as the original bank guarantees are not lying with the respondent No.2 bank. The question of encashment of the bank guarantees does not arise at all in view of the fact that the bank guarantees were not invoked in the manner stipulated in the bank guarantees and the same have expired. She has further submitted that the petition deserves to be dismissed with costs.

22. After having heard learned advocates appearing for the respective parties and after having gone through the pleadings as contained in memo of petition, affidavit-in-reply as well as affidavit-in-rejoinder and after having gone through the contents of the documents produced before the Court and the authorities cited, the Court is of the view that the petitioner is not entitled to any

relief prayed for in the present petition and that the order passed by the learned Joint District Judge, Fast Track Court No.11, Vadodara in Misc. Civil Appeal No.130 of 2003 does not call for any interference by this Court while exercising its extraordinary jurisdiction under Article-227 of the Constitution of India. The Court has discussed the respective pleadings of the parties in the forgoing paragraphs. However, for the purpose of resting its decision it is more than sufficient to observe that the petitioner has not invoked the bank guarantees in the manner in which it ought to have been invoked. Bank guarantees were given in the prescribed format which was supplied by the petitioner with the letter of intents. Clause-4 prescribed the term of payment. Clause-4.1 states that 20% of Ex-works price is payable as interest free advance, subject to furnishing of a Bank Guarantee for equivalent amount as per the

prescribed format enclosed. Similarly, Clause-5.2.1 states that a Bank Guarantee equivalent to 10% of value of the order should be submitted before call for inspection, covering performance of the contract and guaranteed performance as per the prescribed format enclosed valid for a period of one year from the date of commissioning. The bank guarantee contains the provision that in consideration of the said advance thereof made by the purchaser to the vendor the surety hereby guarantees the payment of the said advance to M/s.Wires and Cables India Pvt. Ltd., on receipt of first demand in writing stating that the 'vendor' have not fulfilled their obligation in respect of the guarantee terms of the order. The bank guarantees were originally valid upto 15.9.2002, which were extended upto 30.11.2002. It is the case of the petitioner that the invocation of the bank guarantee was made by letter dated 18.11.2002. However,

the said letter only states that since the transaction was yet to complete a request was made to extend the bank guarantee for a further period of one month to avoid invocation of the same. Even letter dated 21.11.2002 written by the petitioner to the respondent No.2 – Bank states that the bank guarantees may be extended immediately or in case, it was not extended it may be considered as invocation of the said bank guarantees. None of these two letters indicated the term as envisaged in the bank guarantee for the purpose of invocation thereof. It is nowhere stated that the vendor has not fulfilled his obligation in respect of the guarantee's terms of the order. On the contrary, reason for invocation as stated by the petitioner in written statement was that the bank guarantee was scheduled to expire on 30.11.2002 and the plaintiff/respondent No.1 was not providing for the correct bank guarantee and was dilly

dallying the issue. The bank has, therefore, rightly refused to allow the petitioner to invoke the bank guarantee vide its letter dated 21.3.2002 stating that invocation was not as per the terms of bank guarantee.

23. It is settled proposition in law that the bank guarantee should be invoked in consonance with the terms of bank guarantee. In the case of Puri International(P) Ltd., vs. National Building Construction Co. Ltd., and Anr., reported in (1998) 94 Company Cases 528 the Delhi High Court has held that the documents such as bank guarantees have to be enforced as per their terms and the language of the instrument has always enjoyed a position of primacy. In the case of M/s.Ansal Properties & Industries (P) Ltd., vs. Engineering Projects (India) Ltd., reported in AIR 1998 Delhi 176, the Delhi High Court has held that the invocation letter does not fulfill the requirements

agreed in the bank guarantee for invoking the same and as such this performance bank guarantee has not been validly invoked. In the case of M/s.Synthetic Foams Ltd. vs. Simplex Concrete Piles (India) Pvt. Ltd., reported in AIR 1988 Delhi 207, it is held that what is necessary is that there exists special equity in favour of the plaintiff to grant of injunction. No doubt an obligation of a bank under the bank guarantee is absolute, but such an absolute obligation arises only if the conditions of the bond are satisfied and if the demand made on the bank is in strict accord with its terms and there is no element of fraud, misrepresentation or suppression of material facts involved but where there are allegations of fraud, misrepresentation or suppression of facts made by the party against the beneficiary and there is prima facie evidence to suggest that there is some truth in these allegations then there would possibly be no absolute bar

operating against the Court from granting an interim injunction restraining the bank from making the payment on the basis of the bank guarantee. Similar would be the position where the demand made by the beneficiary is in violation of the conditions of the bond or is not in strict accord with its terms. Keeping in view the nature of obligation of the bank the terms of the bank guarantee would have to be strictly construed in such cases. In the case of **BSES Ltd. (Now Reliance Energy Ltd.) vs. Fenner India Ltd., and Anr, reported in (2006) 2 Supreme Court Cases 728**, the Hon'ble Supreme Court has held that the rule that a bank guarantee must be honoured in accordance with its terms, there are, however, two exceptions. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The

second exception to the general rule of non-intervention is when there are “special equities” in favour of injunction, such as when “irretrievable injury” or “irretrievable injustice” would occur if such an injunction were not granted. Considering all these judgments, this Court is of the view that the petitioner has not properly invoked the bank guarantee in terms contained thereunder.

24. There is one more reason for non-interference in the order passed by the appellate Court. It is clearly stated in the letter of intents dated 9.7.2002, Clause-2.1 thereof that 20% Ex-works value is payable as advance against submission of a Bank Guarantee for equivalent value in the enclosed format. The advance Bank Guarantee shall be valid till the date of inspection of the core assembly. The petitioner wrote a letter on 20.6.2002 that the bank guarantee shall be valid till the time transformers are

offered for core assembly inspection. The engineer will return the bank guarantee at the time of inspection and approval. The petitioner by his letter dated 19.10.2002 has waived such inspection by core assembly in respect of subject equipments and it was further stated that the final inspection call has been forwarded to KPTCL. Even final inspection was completed on 26.10.2002 and inspection certificate dated 28.10.2002 was issued. It was produced at Item No.5 in list of respondent No.1 at page-57 of this paper-book, but the actual certificate was not produced in the paper book submitted by the petitioner alongwith this petition. The statement about the inspection made in the reply affidavit of the respondent No.1 in the present proceeding at page-275, is not refuted by the petitioner. The respondent No.1 has informed the petitioner vide its letter dated 25.11.2002 that the transformers were lying ready since 25.10.2002 and

inspected and cleared for dispatch by KTPCL. It was further stated that since the inspection of core-coil assembly / final inspection of transformer was over since 26/28.10.2002 the validity of the bank guarantee was not required to be extended. The respondent No.1 has, therefore, asked the petitioner to arrange the payment of balance amount by way of Demand Draft alongwith the C-Form and advance bank guarantee with extension for cancellation to enable him to discharge the transformers.

25. The Court has also found substance in the submission of Mr.Shah that by virtue of letter dated 23.10.2002 written by the petitioner to the respondent No.1, the purchase order was novated in favour of M/s. Marshal's Power & Telecom (I) Ltd. As a result of this, the said party i.e. M/s. Marshal's Power & Telecom (I) Ltd., also wrote a letter dated 24.10.2002 to the

respondent No.1 stating that all the commitment made to the petitioner stood fully accepted by the said party. The petitioner has also accepted in Ground-R and U stating that the letter of intent was novated in favour of a Company, namely, M/s. Marshal's Power & Telecom (I) Ltd., and the respondent No.1 has commercially acceded to this novation. In view of this, the petitioner cannot be said to be entitled to encash the bank guarantee. As a matter of fact, the fact regarding novation is not in dispute. The petitioner is not entitled to encash the bank guarantee. If the petitioner is not required to pay balance 80% amount, at the same time the petitioner is not entitled to encash the bank guarantee. When the petitioner himself has admitted in his written statement filed before the trial Court that the respondent No.1 having accepted the novation of contract in all terms, excepting few minor

alteration/amendments as indicated in its letter dated 29.10.2002, he has committed gross breach of contract in not complying his obligation required to be carried out / executed or performed at the very inception itself. There is no substance in raising plea that despite the fact that the transformers were kept ready for inspection by KPTCL or RITES, the petitioner and/or M/s. Marshal's Power & Telecom (I) Ltd., should not release the balance of payment without respondent No.1 complying his obligation of providing correct bank guarantee in favour of the beneficiary in accordance with the terms of the contract.

26. Considering the entire facts and circumstances of the case and keeping in mind the limited scope of this Court's power or jurisdiction under Article-227 of the Constitution of India, this Court does not think it just and proper to exercise it in

favour of the petitioner by showing any indulgence and permitting the petitioner to encash the bank guarantees in question. The petition is, therefore, dismissed. Rule is discharged without any order as to costs. Interim relief granted earlier stands vacated.

(K. A. PUJ, J.)

kks